

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE ARMBRUSTER,

Plaintiff,

v.

CELLCYTE GENETICS CORPORATION,
et al.,

Defendants.

No. 08-0047RSL

ORDER CONSOLIDATING
RELATED ACTIONS, APPOINTING
THE NEWBILLS AS LEAD
PLAINTIFFS AND APPOINTING
HAGENS BERMAN AS LEAD
COUNSEL

DOMINIC J. TOLERICO,

Plaintiff,

v.

CELLCYTE GENETICS CORPORATION,
et al.,

Defendants.

No. 08-00163RSL

1 JOE M. PRUITT,

2 Plaintiff,

No. C08-0178RSL

3 v.

4 CELLCYTE GENETICS CORPORATION,
5 *et al.*,

6 Defendants.

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8 This matter comes before the Court on motions to consolidate three related actions
9 and on three motions for appointment of lead plaintiff.¹ On January 14, 2008, the first
10 case was filed by plaintiff Lance Armbruster on behalf of himself and all others who
11 purchased CellCyte securities between April 6, 2007 and January 9, 2008. Two actions
12 were subsequently filed by plaintiffs Dominic Tolerico and Joe Pruitt. All three cases
13 involve claims of securities violations pursuant to the Securities Exchange Act of 1934 as
14 amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”). Plaintiffs
15 allege that defendant CellCyte Genetics Corporation (“CellCyte”)² misled investors by
16 making false and misleading statements to investors and the SEC about the history and
17 experience of the company’s CEO Gary Reys. Reys’ background was called into
18 question after published news reports noted alleged discrepancies regarding his
19 experience and background. CellCyte subsequently removed some of Reys’ biographical

21 ¹ Because the Court finds that this matter can be decided on the parties’
22 memoranda, declarations, and exhibits, the Wyatts’ and the Newbills’ request for oral
23 argument is denied.

24 ² CellCyte is “a company focused on the discovery and development of stem cell
25 enabling therapeutic products.” Wyatt Family’s Motion for Appointment of Lead
26 Plaintiff at p. 3.

1 information from its website. Plaintiffs allege that within days, the value of company
2 stock fell by 55%.

3 **A. Consolidation.**

4 Pursuant to the PSLRA, the Court first considers whether to consolidate the related
5 actions. 15 U.S.C. § 77z-4(a)(3)(B)(ii); 15 U.S.C. § 78u-4(a)(3)(B)(ii). Consolidation is
6 appropriate if the actions “involve a common question of law or fact.” Fed. R. Civ. P.
7 42(a). The Court has broad discretion to consolidate cases pending within the district.
8 See, e.g., Investors Research Co. v. United States Dist. Court, 877 F.2d 777 (9th Cir.
9 1989). In this case, defendants do not oppose consolidation. In addition, all three cases
10 involve common factual and legal questions under the PSLRA including whether
11 defendants made false statements and omissions and whether those actions caused the
12 stock price to increase then precipitously drop as alleged. Consolidation of these actions
13 will promote efficiency, conserve judicial resources, and foster uniform decision-making
14 while avoiding inconsistent results. Accordingly, the Court orders that these actions will
15 be consolidated for all purposes.

16 Defendants argue that the named defendants should be limited to the defendants
17 named in all three actions. Specifically, they note that the Tolerico action names Glen
18 MacDonald, Michael Eyre, and John Fluke, but none of them is a named defendant in the
19 Armbruster and Pruitt actions. They therefore argue that none of the three should be a
20 named defendant in the consolidated action. None of the plaintiffs responded to this
21 argument. However, Tolerico did not file a motion to be appointed lead plaintiff, so he
22 did not necessarily have an opportunity to respond to that argument. In addition, the
23 argument is premature. None of the three defendants has been dismissed. The newly
24 appointed lead plaintiff will file a consolidated complaint which may or may not include
25 the three defendants. Accordingly, the Court will not delete any of the named
26 defendants.

B. Lead Plaintiff and Lead Counsel.

Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(I), plaintiff Armbruster published a notice of pendency of the action in *PR Newswire* on January 14, 2008. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i)(II), three timely applications to be appointed lead plaintiff were filed by the Wyatt family, Jim Thompson, and Anthony and James Newbill (the “Newbills”).

At this stage of the proceeding, the Court accepts the allegations of the multiple complaints as true. The Court evaluates the typicality of plaintiffs’ claims and the adequacy of their representation in light of those allegations.

The alleged losses suffered by the Newbills are approximately \$88,000 and are significantly greater than the losses suffered by any of the other proposed lead plaintiffs. The Newbills also satisfy the requirements of Rule 23 at this stage in the proceedings.³ The PSLRA inquiry on that issue focuses principally on the elements of typicality and adequacy. See, e.g., Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Labranche & Co., 229 F.R.D. 395, 411 (S.D.N.Y. 2004). The Newbills certifications show that they have reviewed the complaint, authorized its filing and are willing to serve as representatives of the class. The Newbills’ claims are typical of the claims of other plaintiffs in the proposed class. They allege that their losses occurred as a result of the same wrongful conduct alleged by other plaintiffs. The Newbills’ claims are based on the same legal theories as other plaintiffs’ claims. The Newbills have retained adequate counsel. The Court finds that the Newbills satisfy the requirements of 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Jim Thompson and the Wyatts do not oppose the Newbills’ motion to be appointed lead plaintiffs. For these reasons, the Court affords the Newbills a

³ Defendants stress, and the Court agrees, that the determinations of adequacy and typicality are solely for purposes of this motion. The Court will reevaluate whether plaintiffs meet those requirements if and when a motion for class certification is filed.

1 rebuttable presumption that they are the most adequate plaintiffs to prosecute the
2 consolidated actions. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

3 The presumption may be rebutted upon proof by a member of the purported
4 plaintiff class that the movant: (aa) will not fairly and adequately protect the interests of
5 the class, or (bb) is subject to unique defenses that render such plaintiff incapable of
6 adequately representing the class. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The claims of the
7 Newbills do not appear to be subject to unique defenses. The record does not describe
8 the relationship between Anthony and James Newbill, although they appear to be related
9 to each other. Because of their familial relationship and two-person composition, the
10 Newbills are likely to be a cohesive plaintiff unit. None of the other parties has offered
11 any arguments to rebut the presumption. Accordingly, the Newbills are hereby appointed
12 lead plaintiffs pursuant to 15 U.S.C. § 78u-4(a)(3)(B).

13 Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), the Newbills have selected the law
14 firms of Hagens Berman Sobol Shapiro LLP as lead counsel. The PSLRA provides that
15 once the lead plaintiff is selected, it “shall, subject to the approval of the court, select and
16 retain counsel to represent the class.” 15 U.S.C. § 78u-4(a)(3)(B)(v). The decision to
17 approve counsel selected by the lead plaintiff is a matter within the discretion of the
18 district court. See In re Milestone Scientific Sec. Litig., 187 F.R.D. 165, 176 (D.N.J.
19 1999). In this case, the record does not show any reasons to reject the Newbills’ choice
20 of counsel. Counsel has been appointed lead counsel in a number of other securities
21 fraud cases, including another one currently pending before this Court, In re Jones Soda
22 Co. Litig., Cause No. 7-1366RSL (W.D. Wash.). The Newbills’ selection of lead counsel
23 is hereby approved.

24 Accordingly, the Court DENIES the motions to be appointed lead plaintiff filed by
25 Jim Thompson and the Wyatt family. The Court GRANTS the Newbills’ motion.

1 Pursuant to Fed. R. Civ. P. 42(a), the above-captioned matters are hereby consolidated for
2 all purposes.

3 Counsel shall make efforts to identify all cases, other than those identified above,
4 which might properly be consolidated as part of this action, whether the cases are
5 currently pending before the Court or are later filed in or transferred to this district. The
6 Clerk of Court is directed to file this Order in Cause No. C08-0163RSL and 8-178RSL
7 and then close those cases. No additional documents shall be filed in Cause No. C08-
8 0163RSL or 8-178RSL. The consolidated action shall be re-captioned as *In re CellCyte*
9 *Genetics Corporation Securities Litigation*, Cause No. C08-47RSL. All documents filed
10 in the future regarding these matters are to be filed under that caption.

11 All counsel shall be responsible for notifying the Court if they become aware of
12 any case that is filed regarding the same subject matter that might be appropriate for
13 consolidation with this case.


14 Lead counsel shall have authority to speak for plaintiffs in matters regarding
15 pretrial and trial procedure and settlement negotiations, and shall make all work
16 assignments in such manner as to facilitate the orderly and efficient prosecution of this
17 litigation and to avoid duplicative or unproductive effort. Lead counsel shall organize,
18 coordinate, and conduct this litigation in the most cost-effective manner possible.

19 Lead counsel shall also be available and solely responsible for communications to
20 and from the Court and shall coordinate the activities of plaintiffs and plaintiffs' counsel
21 in the conduct of the consolidated action. Defendants' counsel may rely upon all
22 agreements made with lead counsel, or their duly authorized representatives, and such
23 agreements shall be binding on plaintiffs.

24 Lead counsel shall be responsible for coordination of all activities and appearances
25 on behalf of plaintiffs and for the dissemination of notices and orders of this Court. No
26 motion, request for discovery or other pretrial proceedings shall be initiated or filed by

1 plaintiffs except through lead counsel. This order shall apply to this consolidated action
2 and to each case that relates to the same subject matter that is subsequently filed in this
3 Court or is transferred to this Court and is consolidated with this consolidated action.

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5 DATED this 28th day of April, 2008.

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9 Robert S. Lasnik
10 United States District Judge
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